No. 75-1197

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Appellant,

vs.

HELEN DE CASTRO,

Appellee.

On Appeal From The United States District Court
For The Northern District of Illinois

BRIEF FOR APPELLEE

THEODORE R. SHERWIN
MARVIN A. BRUSMAN
7 So. Dearborn Street
Chicago, Illinois 60603
(312) 236-2010
Attorneys for Appellee

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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BRIEF FOR APPELLEE

Opinion Below

The opinion of the District Court (J.S. App. A, pp. 1a-18a) is reported at 403 F.Supp. 23 (1975).

Jurisdiction

The jurisdiction of this Court is conferred by 28 U.S.C. §1252.

Statute Involved

The pertinent portions of 42 U.S.C. §402(b)(1) are set out at J.S. App. D, pp. 23a-25a.

Question Presented

Whether Section 202(b)(1)(B) of the Social Security Act (42 U.S.C. §402(b)(1)(B)), which grants social security benefits to a wife with a dependent child in her care, but denies such benefits to a divorced wife with a dependent child in her care, invidiously discriminates against divorced wives in violation of the Fifth Amendment.

Statement

This action was commenced on July 1, 1974 to review a final decision of the Secretary of Health, Education and Welfare denying appellee's application for wife's insurance benefits.

Appellee, who was born on February 18, 1915, has not attained age 62. She and the wage-earner, Albert de Castro, were validly married on September 9, 1946, and were divorced on February 8, 1968, after more than 20 years of marriage. (App. 32). Two children were born of the marriage, namely, Rosemary de Castro and Catherine de Castro. Catherine de Castro, a mentally disabled child entitled to child's insurance benefits, requires continuous custodial care and supervision. (App. 59). She has been in appellee's care at all relevant times, and particularly since December 5, 1966, when Albert de Castro deserted appellee and his family and returned to the Philippine Islands where he has since remained. (App. 32). For a time thereafter, appellee was fortunate to have had the assistance of her mother in caring for Catherine while appellee worked.

Since her mother's death, however, appellee has had to forego work and devote her full time to the care of Catherine. (App. 19). Appellee is not married and is not entitled to old age or disability insurance benefits. (App. 32-33).

On September 23, 1971, appellee filed an application under § 402(b)(1) for wife's insurance benefits on the account of Albert de Castro as the divorced wife of a wage-earner having in her care a child entitled to a child's insurance benefit. (App. 51-54). Section 402(b)(1) provides in part:

> The wife (as defined in section 416(b) of this title) and every divorced wife (as defined in section 416(d) of this title) of an individual entitled to old-age or disability insurance benefits, if such wife or such divorced wife—
>
> (A) has filed application for wife's insurance benefits,
>
> (B) has attained age 62 or (in the case of a wife) has in her care (individually or jointly with such individual) at the time of filing such application a child entitled to a child's insurance benefit on the basis of the wages and self-employment income of such individual,
>
> • • •
>
> shall (subject to subsection(s) of this section) be entitled to a wife's insurance benefit. . . .

Her application was initially denied. (App. 55, 57-58). After a hearing before an Administrative Law Judge, it was determined that appellee was entitled to a wife's insurance benefit effective January 1, 1973. (App. 13-33). Thereafter, the Appeals Council, on its own motion, reviewed and reversed that decision, concluding that only married but

not divorced wives under age 62 with dependent children in their care were entitled to benefits under Section 402(b)(1)(B). (App. 9-13). Appellee then sought judicial review of the denial of her application for wife's insurance benefits. (App. 1-4). In a unanimous decision rendered September 30, 1975, a three-judge District Court declared §402(b)(1)(B) unconstitutional insofar as it discriminates against divorced wives as defined by §416(d), and enjoined appellant from applying the statute in a manner that denied appellee wife's insurance benefits. (J.S. App. A, p. 18a). It is from that final judgment that this appeal is taken. (J.S. App. C, pp. 21a-22a).

Argument

42 U.S.C. §402(b)(1)(B) INVIDIOUSLY DISCRIMINATES AGAINST DIVORCED WIVES AND THEIR CHILDREN IN VIOLATION OF THE FIFTH AMENDMENT.

Under Section 202(b)(1) of the Social Security Act (42 U.S.C. §402(b)(1)), wives, whether married to or divorced from their wage-earner husbands are entitled to social security benefits upon reaching retirement age (62). In addition, Section 402(b)(1)(B) provides benefits to wives, but not divorced wives, with children in their care, regardless of age. This disparity in treatment between wives and divorced wives with respect to the "child in care" benefits was found to be constitutionally impermissible by the three-judge District Court below. For the reasons which follow, the District Court's judgment should be affirmed.

The standard for determining whether a statutory classification is constitutionally sound is whether the classification is rationally based and free from invidious discrimination. *Richardson* v. *Belcher,* 404 U.S. 78 (1971). Under this test, Congressional legislation does not offend the Constitution if the goals to be accomplished are legitimate and the classification adopted is rationally related to the achievement of those goals. As this Court has repeatedly recognized, Congress may not invidiously discriminate among claimants on the basis of criteria wholly unrelated to the object of the legislation. *Weinberger* v. *Salfi,* 422 U.S. 749, 772 (1975). To survive constitutional review, a statutory classification, at a minimum, must be "reasonable, not arbitrary, and must rest upon some ground of dif-

ference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed* v. *Reed,* 404 U.S. 71, 76 (1971), quoting from *F.S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). What then is the object of the child in care provisions of §402(b), and how is that objective served by the exclusion of divorced wives from the statute's coverage?

A. The purpose behind the child in care provisions of §402(b)(1)(B) is to facilitate parental care for dependent children.

Unfortunately, the legislative history of the wife's benefit provisions is of little value in determining the Congressional goal. After an extensive review of three authoritative sources, (App. 23-28), Administrative Law Judge John F. Loehr concluded that:

> "... the House gave scant attention to Section 308(b)(1)(B) [of the Social Security Amendments of 1965, 79 Stat. 375], insofar as the age 62 requirement was concerned; that its main concern was to liberalize the statute and place a wife divorced after 20 years of marriage on a plane with a current wife; and that it did not consider in any way the situation of a divorced wife under age 62 with a child in her care." (App. 25)

However deficient the legislative history may be, the purpose of the legislation nevertheless can be discerned not only from the statutory scheme itself, but as well from comparable provisions in a related section of the Social Security Act. It is apparent, for instance, that Congress' concern in enacting §402(b)(1)(B) was not merely for the wives of wage-earners, but for their children as well. If Congress were concerned solely with providing benefits for wives, there would be no need to limit such benefits to

wives with dependent children. Evidently, Congress was concerned not with the problems of wives alone, but with the care of and responsibility for their children. Thus, benefits are extended to wives and divorced wives upon attainment of age 62. And for the protection of the children, Congress went further and extended benefits to wives, regardless of age, with children in their care. Women without children obtain no benefits until they reach retirement age. 42 U.S.C. §402(b)(1)(B). The extension of benefits to those upon whom the responsibility for raising the children is typically placed evidences a Congressional purpose to enable such women to remain at home and devote themselves to the care of the children. To condition eligibility for social insurance benefits upon the presence of children in the recipient's care cannot rationally be explained, unless the protection of the children is the statute's primary function.

That the purpose behind §402(b)(1)(B) is to provide children with the opportunity for the full-time care and attention of their parents seems to be confirmed by a comparison of the child in care provisions of §402(g). Like §402(b)(1)(B), §402(g) provides benefits to surviving parents who have in their care children of deceased covered employees. As originally enacted, §402(g) benefits were limited solely to surviving widows and divorced spouses of a male insured individual; no benefits were paid to a female wage-earner's surviving spouse. In *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975), this Court held that the exclusion of surviving fathers from benefits under 42 U.S.C. §402(g) violated equal protection concepts implicit in the Due Process Clause of the Fifth Amendment. In reaching that conclusion, the Court found that "Congress' purpose in providing benefits to young widows with chil-

dren was not to provide an income to women who were, because of economic discrimination, unable to provide for themselves. Rather, §402(g), linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work and to devote themselves to the care of children." *Weinberger* v. *Wiesenfeld,* 420 U.S. at 648. Similarly, the decision to grant benefits under §402 (b)(1)(B) to wives with children is explicable only because Congress was concerned with the principle that children of covered employees are entitled to the nurturing care and attention of their mothers, if that parent chooses not to work.

B. The different treatment accorded married and divorced wives by §402(b)(1)(B) lacks a rational basis.

Given the purpose of enabling mothers to remain at home to care for their children, it is clear that the classification created by §402(b)(1)(B) bears no reasonable relation to the achievement of the Congressional goal. Under §402(b)(1)(B), a wife not yet age 62 who has a dependent child in her care is entitled to social security benefits, while a divorced wife, not yet 62, is not entitled to such benefits even though she also has a dependent child in her care, all other conditions being equal. The effect of §402(b)(1)(B) is to create two classes of needy women indistinguishable from each other, with the exception that the one is composed of women not divorced from their wage-earner husbands, and the second of women who have secured divorces after at least twenty years of marriage.[1]

[1] Section 216(d) of the Social Security Act, as amended, 42 U.S.C. §416(d), defines a divorced wife as a "woman divorced from an individual, but only if she had been married to such individual for a period of 20 years immediately before the date the divorce became effective."

On the basis of this sole difference, the first class is granted and the second class is denied social security benefits. Similarly situated wives are, thus, accorded different treatment on the basis of their marital status, a criterion that is wholly unrelated and in fact irrelevant to the statutory purpose of providing benefits to wives who care for children. As the court below pointed out:

> "Since no rational relationship exists between the statutory purpose of providing benefits for wives who care for children . . . and the statutory distinction which permits only married wives under the age of 62 years to receive such benefits, the distinction created by the statute is clearly invidious." 403 F. Supp. at 30.

Plainly, the child supplies the raison d'etre for that portion of 42 U.S.C. §402(b)(1)(B) which grants benefits to wives with children. The benefit afforded is inextricably bound to parental care for minor and disabled children. No benefit exists for the young wife absent a child of the insured individual in her care. It is the care of the minor and disabled child which gives rise to the need for benefits. That need exists regardless of whether the child's mother is married, separated or divorced. The need of children of divorced wives for parental care and supervision is no less than that of children of married wives. The children of divorced wives deserve the same degree of maintenance and support, care and attention as is accorded the children of other wives. The need for benefits in each case is the same, and should be satisfied for all regardless of the mother's marital state. To withhold benefits from wives divorced after more than 20 years of marriage who are caring for dependent children born of the marriage, while granting them to other wives, is to invidiously discriminate against divorced wives and their children without any rational basis for so doing.

The sheer irrationality and inequality of §402(b)(1)(B) becomes manifest when one considers the consequences that follow in its wake. Thus, a child whose parents are married may receive his mother's care, but the child of divorced parents must get along without such care. Children of wives separated but not divorced and children of wives married but less than 20 years are given the advantages and opportunities afforded by their parents' full time care, but not the children of divorced wives. The wife who is separated from her husband receives benefits as does the wife whose marriage, though intact, is of a short duration, but not the divorced wife. A married woman may stay home with her child, but a divorced woman may not stay home with hers. Solely because appellee exercised her legal right to obtain a divorce, she is denied benefits to which she would otherwise be entitled, benefits that would permit her to stay at home and attend personally to the care of her disabled daughter, a child whose father deserted both her and her mother. Having recognized a need among young children for maternal care, and having determined to fulfill that need by granting benefits to wives who can provide the necessary care, it is entirely irrational for Congress then to exclude divorced wives from such coverage. The need does not change simply by virtue of the mother's divorce. The restriction of §402(b)(1)(B) child in care benefits to married wives does not "rest upon some ground of difference having a fair and substantial relationship to the object of the legislation". *F.S. Royster Guano Co.* v. *Virginia, supra,* 253 U.S. at 415.

Appellant argues, however, that the exclusion of divorced wives from benefits under §402(b)(1)(B) has a rational basis. He contends that Congress may draw classifications based upon its assessment of the probable needs of individuals, and that the statutory scheme of §402(b)

(1)(B) is consistent with the purpose of allocating benefits to those with the greatest need. Appellant asserts that Congress "correctly determined that wives are substantially more likely than divorced wives to be dependent upon the wage-earner for economic support," (App. Br. 19) and thus more likely to suffer economically upon termination of the wage-earner's employment. The argument is premised on misleading statistics and appellant's questionable conclusions drawn therefrom. The statistics are that only 14 per cent of divorced women are awarded alimony, from which appellant concludes that "few divorced women receive support from their former husbands." (App. Br. 20). The statistics, however, fail to distinguish between child support and alimony, and fail to indicate the percentage of divorced women who receive and rely upon child support payments from their ex-husbands, payments which are inevitably reduced upon the husband's retirement or disability. There is a direct correlation between a husband's earnings and the amount of child support paid; as the earnings decline so too do the support payments. Like her married counterpart, a divorced wife suffers a financial loss equivalent to that of a wife upon the termination of the wage-earner's employment. Under such circumstances, Congress' assessment of the greater need for benefits among wives as opposed to divorced wives is wholly unwarranted and without foundation in fact or logic. Wives and divorced wives are at least equal so far as financial needs are concerned, and suffer corresponding losses of support when the wage-earner retires or becomes disabled. Likewise, the needs of wives with dependent children are substantially the same as those of divorced wives, and both groups are equally affected by the termination of the wage-earner's employment. In fact, the "disruptive effect" caused by the disability or retirement of the wage earner is, perhaps, most acutely felt by the divorced wife

with dependent children. To supplement reduced support payments, she is forced into the job market without having the assistance of another parent at home to care for the children. In contrast, a wife, if she chooses to enter the job market, at least has the presence of her husband at home to provide such care. As was recognized by the Court below:

> "... There is no rational basis for concluding that a married wife having a dependent child in her care has a greater economic need than a divorced wife caring for such a child. In many cases the reverse will be true." 403 F.Supp. at 28.

Nor is there any rational basis for concluding that the effect of a wage-earner's retirement or disability is more severe for a married wife than a divorced wife. Absent a rational basis for the different treatment accorded married and divorced wives by §402(b)(1)(B), that section violates equal protection guarantees implicit in the Due Process Clause of the Fifth Amendment.

The distinctions appellant urges to justify the disparate treatment of married and divorced wives are more imaginary than real. And while they may lend some credence to his argument that wives and divorced wives are in sufficiently different circumstances so as to deserve different treatment, the distinctions falter when the primary Congressional purpose of the legislation is taken into account. By affording benefits to wives with children in their care, Congress obviously sought to provide adequate care and protection for the children of entitled wage-earners. Although the benefits are paid directly to the wife, the ultimate beneficiaries are the dependent children. The wife receives the benefits not because she is married, but because the benefits provided to her will enable her to remain at home and provide the necessary care for the children. The problem dealt with by the statute here is the needs of dependent children. Within this area of need, no rational justification exists for distinguishing between married and divorced wives whose children have similar needs and who otherwise qualify for benefits.

Appellant argues finally that the legislative decision to expand wives' benefits to divorced women over but not under age 62 constitutes a rational effort to deal with the economic problems of elderly divorced wives. (App. Br. 24-27). That may well be. The discrimination here at issue is not, however, between young and old divorced wives. Nor is it between married and divorced wives without children. Both married and divorced wives, absent children in their care, are treated alike by §402(b)(1)(B). Both must attain age 62 before becoming entitled to social security benefits. Rather the discrimination with which we are concerned is that between young married wives with children and young divorced wives with children. It is that discrimination for which we can find no rational basis. However rational the individual legislative decisions to expand the Act's coverage may have been, the resulting statutory scheme obviously and impermissibly discriminates against divorced wives. The fact that Congress may not have intended the discrimination does not detract from the statute's discriminatory operation and does not alleviate the statute's inequitable effect.

The 1965 Amendment to §402(b) providing old-age benefits to divorced wives who had been married to a wage-earner for at least 20 years prior to divorce underscores the injustice of the current statutory scheme. Congress recognized that women divorced after 20 or more years of marriage are often unable to work and earn social security

benefit protection of their own. Like other wives, they spend a substantial portion of their lives at home caring for the family. Despite their similar contributions to the family and similar needs upon reaching retirement age, divorced wives were excluded from social security benefits. To rectify this discrimination, Section 402(b) was amended and a wife divorced after 20 years or more of marriage was placed on an equal footing with a wife not divorced. Divorced wives, young and old, are now treated on an equal basis with married wives, except when dependent children are in their care. In light of the express Congressional policy to accord equality of treatment to divorced wives, and in light of the congressional concern for dependent children evinced by Section 402(b)(1)(B), the granting of benefits to married wives with children and the withholding of such benefits from similarly situated divorced wives lacks the rationality required by equal protection guarantees.

C. The classification created by §402(b)(1)(B), based on the marital status of the wife, is not rationally related to the achievement of the Congressional goal.

Recent decisions of this and other courts have struck down legislative classifications based on marital status.[2] In *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968), for example, this Court held that a Louisiana statute that allowed a right of recovery to a mother for the wrongful death of her child, but not to an unwed mother was violative of the constitutional guarantee of equal protection. In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), a statutory scheme which allowed distribution

[2] See also 5 U.S.C. §§ 7152 and 7154 (prohibiting discrimination in federal employment because of, inter alia, marital status).

of contraceptives to married individuals, but prohibited such distribution to unmarried persons was found to violate the Equal Protection Clause of the Fourteenth Amendment. Similarly, in *Stanley* v. *Illinois*, 405 U.S. 645 (1972), this Court invalidated a statutory procedure by which children of unwed fathers automatically became wards of the state upon the death of their natural mothers. Under the Illinois law there involved, married fathers, whether divorced, widowed or separated, and mothers, whether married or unwed, could be deprived of their children only after notice, hearing and proof of such unfitness as a parent as amounts to neglect, while unwed fathers were presumed unfit and their children taken from them without any such showing of neglect. Denying a hearing to unwed fathers while granting a hearing to all other Illinois parents was "inescapably contrary to the Equal Protection Clause." *Stanley* v. *Illinois*, 405 U.S. at 658. Finally, in *Moritz* v. *Commissioner of Internal Revenue*, 469 F. 2d 466 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973), a provision of the Internal Revenue Code (26 U.S.C. § 214(a)) allowing a deduction to women, widowers, divorcees (male or female) and to husbands with institutionalized or incapacitated wives, but denying a like deduction to unmarried men was found to be constitutionally defective.

The statutes involved in *Glona, Eisenstadt, Stanley* and *Moritz* all suffered from the same vice. Rights and benefits were allocated on the basis of an individual's marital status, a criterion which was found to bear no rational relation to the objectives ostensibly sought to be achieved by the legislation. §402(b)(1)(B) similarly mandates differential treatment of identically situated wives, not on the basis of need, but instead on the basis of their marital status, a criterion that bears no relationship whatsoever

to the recognized Congressional goal. If, as we submit, the Congressional objective is to help provide a mother's nurturing care to her dependent child, then the classification created by §402(b)(1)(B)—based as it is on the mother's marital status rather than upon her need or that of the child—is not rationally related to the achievement of that goal. A social insurance benefit, which is designed to facilitate parental care for minor and disabled children, is not constitutionally allocated when it includes children with married mothers, but excludes children with divorced mothers.

Conclusion

While it is true that social security benefits are a matter of legislative grace, that is not to say that Congress can grant them to some and withhold them from others on the basis of irrelevant criteria. Once Congress has determined to grant benefits to wives with dependent children in their care, all wives, whether married or divorced, are constitutionally entitled to them, absent some rational justification for a contrary result. We respectfully submit that §402(b)(1)(B), in denying benefits to Helen de Castro and those like her, while granting benefits to other wives, contravenes the equal protection guarantee implicit in the Fifth Amendment Due Process Clause. Accordingly, the judgment of the District Court should be affirmed.

Respectfully submitted,

THEODORE R. SHERWIN
MARVIN A. BRUSMAN
Attorneys for Appellee